

AGENDA  
JUNE 20, 2017  
12:00 PM

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1. Concerns Related to Separation of Powers  
-Speaker Greg Hughes
2. Legal Issues  
-John Fellows, General Counsel OLRGC
3. Open Discussion
4. Other Business
5. Adjourn

# In our opinion: Fight against governor over special election is political grandstanding

By Deseret News editorial board

Published: June 19, 2017 5:05 p.m.

Updated: 15 hours ago



Comments

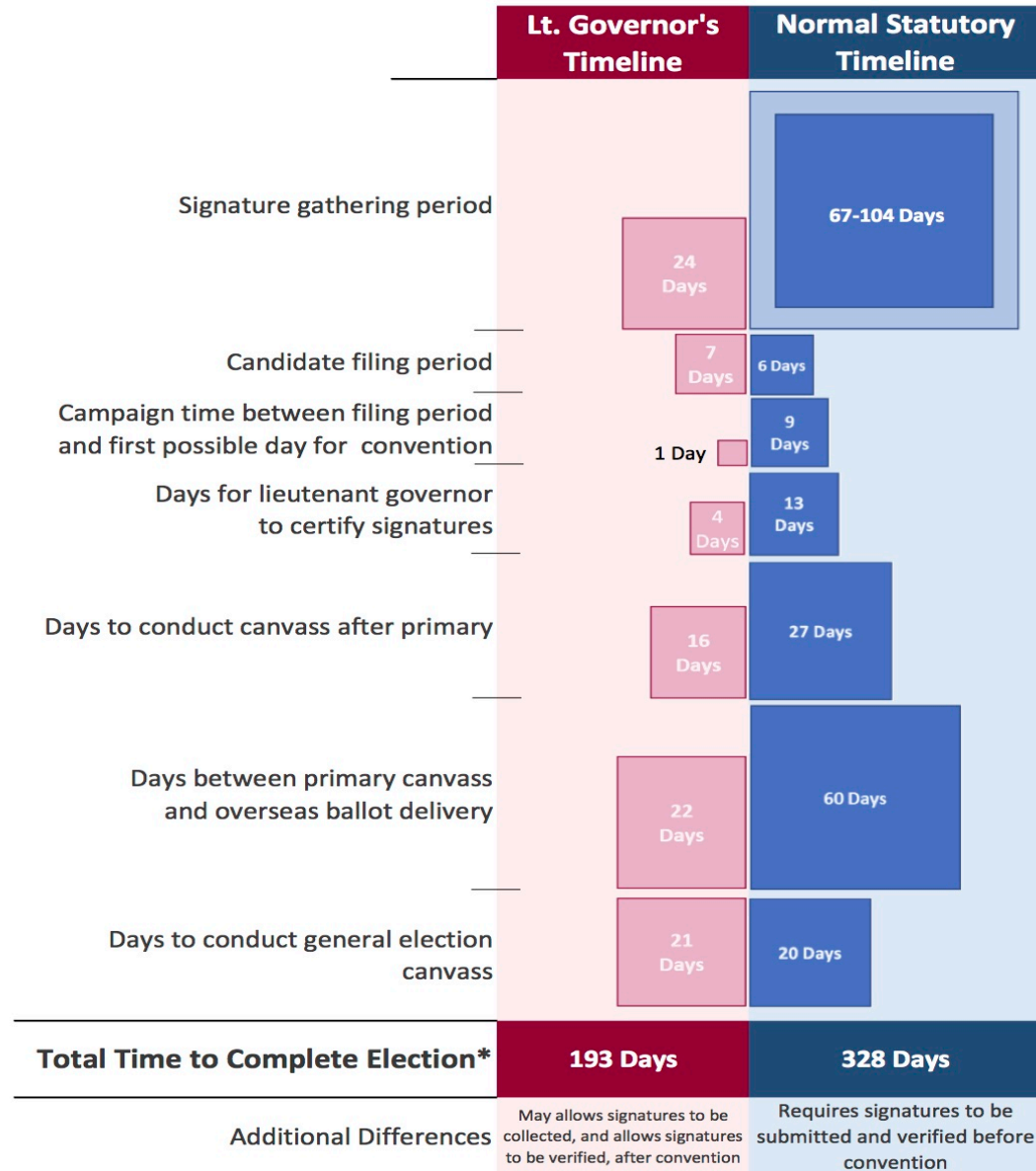
*... We believe elected officials need to follow rules, especially the governor. And, we believe that the Legislature should absolutely act as a check on executive overreach.*

With regard to the special election, however, *Gov. Herbert followed the rules and was conscientious about acting under statutory authority* and under advice of his legal counsel...

...Therefore, given the governor's obligation under statute, Herbert called "an election to fill the vacancy" using the *regular election laws and procedures already in place for normal elections.*

# Comparison of Timelines

To Fill a Vacancy in the U.S. House of Representatives | May 19, 2017



\* Beginning on first day to gather signatures and ending on last day to conduct canvass as compared against the 2018 elections schedule.

# Battle heating up between lawmakers, governor over special congressional election

By [Lisa Riley Roche](#)  [@dnewspolitics](#)

Published: June 19, 2017 8:10 p.m.

Updated: 11 hours ago



Comments

PAUL EDWARDS, GOVERNOR'S DEPUTY CHIEF OF STAFF:

*"It just seems like an odd thing," Edwards said. "We have real fires destroying property and threatening lives around the state. We don't need manufactured fires because there's no real issue to argue about at this point."*

The Legislature has its own attorneys, he said, and if there is "some sort of legal problem with this, it needs to get to court fast" *to be fair to the candidates and voters* "involved in what we think is a very fair and orderly process."

# TIMELINE OF EVENTS

- April 19 – Chaffetz announces he will not seek re-election.
- May 10 – informal legislative working group develops an agreed upon process in anticipation of a special session.
- May 15 – President Niederhauser meets with Gov. Herbert to present concerns and *asks him to convene a special session.*
- May 17 –Speaker Hughes and President Niederhauser meet with Gov. Herbert and *again request a special session.* Gov. Herbert tells legislative leaders *he will consider their proposal.*
- May 19 – Chaffetz announces his *intent* to resign

May 18, 2017


**VIA ELECTRONIC MAIL**

The Honorable Gary R. Herbert  
Governor  
State of Utah  
350 North State Street, Suite 200  
Salt Lake City, UT 84114-2220

Dear Governor Herbert:

I write to inform you in advance of my intent to resign from the office of U.S. Representative at the close of business on June 30, 2017. It has been a tremendous honor and privilege to serve the people of Utah as a Member of Congress. I look forward to working with you and others as a private citizen to continue to find ways to improve our remarkable State and Nation.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Chaffetz", with a large, stylized initial "J" and "C".

Jason E Chaffetz  
U.S. Representative  
Utah Third Congressional District

- May 19 – Governor Herbert Executive Order/Proclamation – Writ of Election
- May 19 – Lt. Gov. Cox Issues an order detailing election process



# EXECUTIVE ORDER/ PROCLAMATION

## ISSUING A WRIT OF ELECTION

**WHEREAS**, Congressman Jason Chaffetz has officially announced his intention to vacate his congressional office in the Third Congressional District of Utah on June 30, 2017; and

**WHEREAS**, Article I Section 2 of the United States Constitution states that “when vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies;” and

**WHEREAS**, consistent with the United States Constitution, the Utah Legislature has directed the Governor through Utah Code 20A-1-502 that “[w]hen a vacancy occurs for any reason in the office of a representative in Congress, the governor shall issue a proclamation calling an election to fill the vacancy;” and

**WHEREAS**, Utah Code 20A-1-203 states that the Governor may call a statewide special election for any purpose authorized by law; and

**WHEREAS**, Utah Code 67-1a-2(2)(a) designates the Lieutenant Governor as the Chief Election Officer of the State and authorizes him to “exercise general supervisory authority over all elections,” and to “exercise direct authority over the conduct of elections for federal, state, and multicounty officers;” and

**WHEREAS**, Utah Code 20A-1-402 declares that “[t]he election officer shall render all interpretations and make all initial decisions about controversies or other matters” arising from the election code; and

**WHEREAS**, it is in the best interest of the public good to hold an election, and any necessary primary, consistent with the currently scheduled and planned for municipal general elections on November 7, 2017, and to hold those elections in a manner consistent with general election procedures adopted by the legislature, and in a manner inclusive of the entire electorate.

**NOW, THEREFORE**, I, Gary R. Herbert, Governor of the State of Utah, by the authority vested in me by the Constitution and laws of the State and the Constitution of the United States, do hereby issue this Writ of Election (consistent with the United States Constitution Article I Section 2), Proclamation (consistent with Utah Code 20A-1-502), and Executive Order (consistent with Utah Code 20A-1-203) to the Chief Election Officer of the



# OFFICE OF THE LIEUTENANT GOVERNOR

Pursuant to Article I Section 2 of the United States Constitution which states that “when vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writ of Election to fill such Vacancies”; and

Pursuant to Utah Code 20A-1-502 which states that “[w]hen a vacancy occurs for any reason in the office of a representative in Congress, the governor shall issue a proclamation calling an election to fill the vacancy”; and

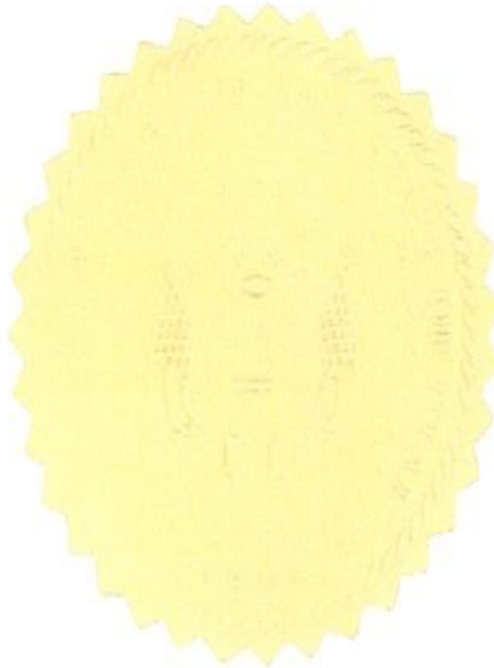
Pursuant to Utah Code 20A-1-203 which states that the Governor may call a statewide special election for any purpose authorized by law; and

Pursuant to Utah Code 67-1a-2(a) which designates the Lieutenant Governor as the Chief Election Officer of the State and authorizes him to “exercise general supervisory authority over all elections,” and to “exercise direct authority over the conduct of elections for federal, state, and multicounty officers”; and

Pursuant to Utah Code 20A-1-402 which declares that “[t]he election officer shall render all interpretations and make all initial decisions about controversies or other matters” arising from the election code;

I, Spencer J. Cox, Lieutenant Governor of the State of Utah, as the Chief Election Officer for the state of Utah with authority to “exercise general supervisory authority over all elections,” and to “exercise direct authority over the conduct of elections for federal, state, and multicounty officers,” do hereby set forth the special election process and calendar for the June 30, 2017 vacancy of the Third Congressional District of Utah in the attached document.

The special general election shall be held on the same day as the municipal general election, November 7, 2017. If a special primary election is needed, it shall be held on the same day as the municipal primary election, August 15, 2017. As required by Utah Code 20A-1-204(2), election officials shall, to the extent practicable, coordinate polling places, ballots, and all aspects of election administration to minimize voter confusion and ensure the special election and the municipal election are conducted in an efficient manner. The special election shall be conducted using the procedures for a regular general election except as provided in the attached document.



In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State of Utah, at Salt Lake City, this 19th day of May, 2017.

Spencer J. Cox  
Utah Lieutenant Governor

May 19 – May 26 – candidates file for office

May 19 – Joint bipartisan op-ed from House & Senate Leaders

May 20 – Speaker Hughes has a conversation with AG Reyes about potential legal opinion on questions we have.

May 23 – John Fellows formally requests a legal opinion from the AG Reyes per ***Utah Code 67-5-1(7)***.

## Utah Code 67-5-1(7)

- (7) *give the attorney general's opinion in writing and without fee to the Legislature* or either house and to any state officer, board, or commission, and to any county attorney or district attorney, when required, *upon any question of law relating to their respective offices;*

- May 23 – Parker Douglas, AG General Counsel responds that their office will get us the opinion by May 26.
- May 25 – The United Utah Party submits signatures to become a qualified political party in Utah.
- May 26 – Jim Bennett files for office as a candidate for the United Utah Party but his application is rejected because the signatures to become a qualified political party were not certified. Bennett indicates he will *pursue a legal challenge* the election office's determination.

- May 26 – AG's office (Spencer Austin) informs us, via phone call, that their opinion was completed and signed by noon, but due to potential conflicts of interest related to attorney client privilege and indications of complaints to the State Bar Office of Professional Conduct, they can't provide the opinion on the date requested.
- May 27 – Follow-up letter from John Fellows to the AG that re-states the request for a legal opinion per ***Utah Code 67-5-17(7)***.
- May 27 – Letter from John Fellows to Billy Walker of the State Bar Office of Professional Conduct explaining that our request of the AG's office is ***authorized by statute and allowed within the Rules of Professional Conduct***.

- May 30 – Official letter from AG's office (Spencer Austin) details the concerns related to the Bar Office of Professional Conduct but states that they ***anticipate being able to reach a decision by the end of the week.***
- May 31 – Conference call between legislative leaders, legislative attorneys and AG Reyes and members of his office to discuss further our desire to get the requested legal opinion. AG Reyes explains the potential complaints to the State Bar ***must be resolved before they will provide their legal opinion.***



M E M O R A N D U M  
OFFICE OF THE ATTORNEY GENERAL

TO: MEMBERS OF THE CONSTITUTIONAL REVISION COMMISSION

FROM: OFFICE OF THE ATTORNEY GENERAL

DATE: SEPTEMBER 10, 1990

RE: DISCUSSION OF ISSUES REGARDING THE CONSTITUTIONAL  
ESTABLISHMENT OF THE OFFICE OF THE ATTORNEY GENERAL

Writing opinions is one of the important ways that the Attorney General helps set a consistent legal policy for the state. State agencies with conflicting or unclear views about state law may seek clarifying advice from one source.



In Utah, the Attorney General has both common law and statutory duties to provide written opinions to government offices. Section 67-5-1 (6) Utah Code Ann. (1986) provides: "The attorney general shall: (6) give his opinion in writing and without fee to the Legislature, or either house, and to any state officer, board, or commission, and to any county attorney , when required, upon any question of law relating to their respective offices[.]" This statutory charge has existed basically unchanged since 1898.

Over 6,000 formal and informal written opinions have been issued by Utah Attorney Generals since the year 1945. These opinions are compiled, published in the State Bulletin, and kept available in several repositories including the Supreme Court Law Library, State Archives, in local law school libraries, Westlaw, Lexis (computer services) and of course, the Attorney General's office.

June 1 – Chia-Chi Teng announces he will *sue* in an attempt to get on the ballot.

June 7 – Speaker and President request a legal opinion from the General Counsel of the Utah Legislature.

June 13 – Utah Legislature General Counsel provides the requested legal opinion.

Question 1: Legally, when does the Third District Congressional vacancy occur? Does it occur at the time Congressman Chaffetz announced his intent to resign, or at the time when his resignation takes effect?

Question 2: Based upon the answer to Question 1, is the Writ of Election issued by Governor Herbert on May 19, 2017, which appears to be based on Representative Chaffetz's announced intent to vacate on a future date valid?

Question 3: What is the scope of the Governor's authority under the provision of the U.S. Constitution requiring him to issue a writ of election to fill a midterm vacancy in the office of Representative in the United States House of Representatives? Is the Governor's authority limited to calling an election and stating the date of the election? If not, what additional authority does the Governor have, what is the source of that authority, and how does it differ from the Legislature's authority to prescribe the "Times, Places and Manner of holding Elections for . . . Representatives"?

Question 4: Is the document issued by Lieutenant Governor Cox on May 19, 2017 valid? Does the Utah statute designating the Lieutenant Governor as the "chief election officer" provide him with the necessary authority to establish election dates and processes when a Congressional vacancy occurs? If not, what other or additional authority does the Lieutenant Governor have, what is the source of that authority, and how does it differ from the Legislature's authority to prescribe the "Times, Places and Manner of holding Elections for . . . Representatives"?

Question 5: Who has the authority to establish the election process to fill a midterm vacancy in the office of Representative in the United States House of Representatives? Is it the Legislature, the Governor, or the Lieutenant Governor? Does the Legislature's authority to prescribe "[t]he Times, Places and Manner of holding Elections for . . . Representatives" include the authority to establish a process for qualifying candidates for the ballot for an election at which an individual is to be elected to fill a midterm vacancy in the office of Representative in the United States House of Representatives? Does either the Governor or Lieutenant Governor share that authority or have independent authority to establish that process? If so, what is the source and scope of that authority for the Governor or Lieutenant Governor?

Question 6: Under Title 20A, Elections, of the Utah Code, the Legislature has established a process for electing an individual to the office of Representative in the United States House of Representatives at the regular general election. That process includes time frames for and sequencing of events, a process for parties to nominate candidates, and a primary election. Does either the Governor or Lieutenant Governor have the authority to establish their own process for electing an individual to fill a midterm vacancy in the office of Representative in the United States House of Representatives, regardless of whether that process is similar to, or contains the same or similar elements of, the process established by the Legislature? If so, what is the source and scope of either the Governor or Lieutenant Governor's authority?



# When Vacancies Happen

- United States Constitution Article 1, Section 2:

**When vacancies happen** in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

- Utah Code 20A-1-502(1)

(1) **When a vacancy occurs** for any reason in the office of a representative in Congress, the governor shall issue a proclamation calling an election to fill the vacancy.

# 3 Branches of Government

- Utah Constitution Article V, Section 1 [Three departments of government.]

The powers of the government of the State of Utah shall be divided into *three distinct departments*, the Legislative, the Executive, and the Judicial; and *no person charged with the exercise of powers properly belonging to one of those departments, shall exercise any functions appertaining to either of the others*, except in the cases herein expressly directed or permitted.

# Legislature Prescribes

- United States Constitution, Article I, Section 4:

*“The Times, Places, and Manner of holding Election for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of choosing Senators.”*

- United States Code Title 2, Section 8:

*“(a) In general*

*“... the time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.”*



# Counsel – Legislature, Governor, AG

- Utah Constitution Article VI, Section 32(2)

The Legislature may appoint a legal counsel which shall provide and control all legal services for the Legislature *unless otherwise provided by statute*.

- Utah Constitution Article VII, Section 5(4)

*The Governor may appoint a legal counsel* to advise the Governor

- Utah Constitution Article VII, Section 16 [Duties of Attorney General.]

The Attorney General shall be the legal adviser of the State officers, except as otherwise provided by this Constitution, and shall perform such *duties as provided by law*.

# AG Shall Give an Opinion

- Utah Code 67-5-1(7)

(7) *give the attorney general's opinion in writing and without fee to the Legislature* or either house and to any state officer, board, or commission, and to any *county attorney or district attorney, when required, upon any question of law relating to their respective offices;*

# AG Attorney-Client Relationship

- Utah Code 67-5-17. Attorney-client relationship.

(1) When representing the governor, lieutenant governor, auditor, or treasurer, or when representing an agency under the supervision of any of those officers, the attorney general shall:

- (a) keep the officer or the officer's designee reasonably informed about the status of a matter and promptly comply with reasonable requests for information;
- (b) explain a matter to the extent reasonably necessary to enable the officer or the officer's designee to make informed decisions regarding the representation;
- (c) abide by the officer's or designee's decisions concerning the objectives of the representation and consult with the officer or designee as to the means by which they are to be pursued; and
- (d) jointly by agreement, establish protocols with the officer to facilitate communications and working relationships with the officer or agencies under the officer's supervision.

***(2) Nothing in Subsection (1) modifies or supercedes any independent legal authority granted specifically by statute to the attorney general.***

# Statewide Special Election

- Utah Code 20A-1-203(3)

(3) The governor may call a *statewide special election* by issuing an executive order that designates:

(a) the date for the *statewide special election*; and

(b) the purpose for the *statewide special election*.

# Chaffetz Intent to Resign

- Excerpt from Congressman Chaffetz letter to Governor Gary Herbert

“I write to inform you in advance of *my intent to resign* from the office of U.S. Representative at the close of business on June 30, 2017...”